

BRUSSELS
CHICAGO
DENVER
DETROIT
JACKSONVILLE
LOS ANGELES
MADISON
MILWAUKEE
ORLANDO
SACRAMENTO
SAN DIEGO/DEL MAR
SAN FRANCISCO
TALLAHASSEE
TAMPA
WASHINGTON, D.C.
WEST PALM BEACH

FOLEY LARDNER
ATTORNEYS AT LAW

January 3, 2003

BY E-MAIL

Thomas A. Andreoli
Sonnenschein Nath & Rosenthal
8000 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606

Re: ICC Docket 02-0277

Dear Tom:

This letter concerns PDV Midwest Refining, LLC's and CITGO Petroleum Corporation's responses to Commonwealth Edison Company's First Set of Data Requests. For the reasons discussed below, ComEd believes that these responses are inadequate and fail to comply with the requirements of the Commission's discovery rules or with the Rules of the Illinois Supreme Court. This letter is to request that immediate measures be taken to cure these inadequacies as discussed herein. In the absence of such measures, ComEd will be forced to file an appropriate motion to secure PDV Midwest's and CITGO's compliance with its discovery requests.

Background

As you know, ComEd initiated this proceeding after it learned that the Needle Coker Company and Chicago Carbon Company filed a lawsuit against PDV Midwest and one of its affiliates (which I will refer to simply as "PDV Midwest" or "PDV") in the Circuit Court of Cook County (the "Litigation"). Needle Coker and Chicago Carbon claim in the Litigation that PDV Midwest engaged in a "three year fraudulent billing scheme involving millions of dollars and vast amounts of electricity" supplied to the industrial facility located in Lemont, Illinois (the "Facility") that is at issue here. (Litigation, Complaint, ¶¶ 2 & 3). At the heart of this "scheme"

FOLEY & LARDNER
321 N. CLARK STREET
CHICAGO, ILLINOIS 60610

TEL: 312.832.4500
FAX: 312.645.0183
WWW.FOLEYLARDNER.COM

WRITER'S DIRECT LINE
312.832.4914

EMAIL ADDRESS
rfeldmeier@foleylaw.com

CLIENT/MATTER NUMBER
458590-0101

011.513819.2

FOLEY: LARDNER

Thomas A. Andreoli
January 3, 2003
Page 2

was the allegation that PDV Midwest purchased electricity from ComEd that was then "resold" to Needle Coker and Chicago Carbon at inflated prices. (Complaint, ¶ 18).

Needle Coker and Chicago Carbon attached internal PDV documents to their Complaint filed in the Litigation in which PDV executives acknowledged that PDV was reselling electricity. In the document attached to the Complaint as Exhibit A, PDV's executives stated that Needle Coker and Chicago Carbon would serve as "profit centers" under the "action plan" they had developed. This would occur because PDV would "sell them electricity at a higher rate" than PDV was then paying to ComEd. (Complaint, ¶ 18 and Ex. A, ¶ 5).

In the instant proceeding, ComEd alleges the same facts that Needle Coker and Chicago Carbon alleged in the Litigation. ComEd contends that the same "scheme" engaged in by PDV that is the basis for the Litigation also violated the Illinois Public Utilities Act, prior Commission Orders and the terms of ComEd's Rider 12.

PDV Midwest and CITGO have answered ComEd's Amended Petition and Complaint, and have, among other things, raised a number of affirmative defenses. In these defenses, PDV Midwest and CITGO claim that the transactions at issue in the Litigation did not involve the illegal resale of electricity, but instead involved an appropriate "allocation" of electricity costs among the several entities operating at the Facility. (Affirmative Defenses, ¶¶ 4 & 6). PDV Midwest and CITGO also claim that ComEd had been informed of the ownership structure of the entities operating at the Facility, and that this is also a defense to ComEd's claims. (Affirmative Defenses, ¶¶ 1 & 2).

ComEd, in its First Set of Data Requests, requested that PDV Midwest and CITGO produce documents and other information regarding the allegations of electricity resale made in the Litigation. PDV Midwest and CITGO failed to respond to a number of ComEd's requests. Most significantly, PDV Midwest and CITGO failed to provide factual information or documents concerning many of the issues that they raise as affirmative defenses to ComEd's claims. PDV Midwest's and CITGO's failure to respond to these data requests is improper, and complete responses should be provided.

ComEd Data Requests

1. Data Request 1.04

FOLEY LARDNER

Thomas A. Andreoli

January 3, 2003

Page 3

In this request, ComEd asked PDV Midwest and CITGO to provide the following information concerning their purported "allocation" of costs of electricity provided to the Facility:

- ☐ state each and every instance when the costs of electricity provided under the Rate CS Contract were allocated;
- ☐ identify the entity or entities to whom the costs were allocated;
- ☐ identify the amount of costs that were allocated; and
- ☐ state the amount of electricity that was the subject of the allocation.

(Request 1.04 subparts (c) – (f)).

None of this information was provided. The transactions at issue in this request (whether they are characterized as an "allocation" or a resale) are at the heart of the dispute in this proceeding. The refusal to provide information regarding these purported allocations clearly is improper under the Commission's discovery rules.

PDV Midwest and CITGO have produced certain documents which they claim relate to these purported "allocation" transactions. We are in the process of reviewing those documents to determine whether they sufficiently comply with the request. We will contact you if necessary when this review is completed.

2. Data Request 1.05

In this request, ComEd sought the production of "each and every document that discusses or refers or that relates to the Litigation," including, but not limited to:

- ☐ any and all communications (including e-mail communications) or items of correspondence that discuss or refer or that relate to the Litigation;
- ☐ all documents produced by any party in connection with the Litigation;
- ☐ all other documents that discuss or refer or that relate to discovery in the Litigation including, but not limited to, responses to any interrogatories propounded in the Litigation and the transcripts of any depositions taken in connection with the Litigation; and

FOLEY LARDNER

Thomas A. Andreoli

January 3, 2003

Page 4

- ☐ all documents that discuss or refer or that relate to the settlement of the Litigation including, but not limited to documents that discuss or refer or that relate to negotiations concerning the settlement of the Litigation, including any draft settlement agreements.

(Request No. 1.05 subparts (b) – (e)).

These documents have not been produced. For example, document PC 04169 – 04178 establishes that Needle Coker and Chicago Carbon served document requests dated April 10, 2001 on PDV and CITGO in the Litigation. Nearly two years later, PDV and CITGO presumably have responded to these and other discovery requests. Yet no documents that PDV produced in response to discovery requests served in the Litigation were provided to ComEd. In addition, no deposition transcripts, correspondence or materials relating to the settlement of the Litigation were produced.

PDV Midwest's and CITGO's failure to produce any of these documents is improper. As discussed above, the Litigation involved the same factual allegations concerning PDV Midwest's illegal resale "scheme" that have been made here. Documents pertaining to the Litigation are therefore reasonably calculated to lead to the discovery of admissible evidence and must be provided to ComEd.

Also, please note that it is our understanding that the law firm of Eimer Stahl Klevorn & Solberg represented PDV and CITGO in the Litigation. Eimer Stahl therefore presumably has documents and information in its possession that are responsive to this data request and to other ComEd data requests. In responding to ComEd's requests, please confirm that materials in Eimer Stahl's possession have been reviewed and that responsive materials have been provided.

3. Data Request 1.09

This data request involves the meeting that occurred on April 24, 1997, concerning electricity supplied to the Facility. In their Answer, PDV Midwest and CITGO claim that at this meeting, ComEd was provided with an "accurate description of the planned ownership structure of the refinery, needle coking and calciner plants" at the Facility. (Answer, pp. 12 – 13). They also claim that the events at this meeting are an affirmative defense to ComEd's claim.

Thomas A. Andreoli
January 3, 2003
Page 5

In this request, ComEd asked that PDV and CITGO state in detail what ComEd was allegedly told at this meeting concerning the "ownership structure of the refinery, needle coking and calciner plants" at the Facility. (Request 1.09). PDV Midwest and CITGO did not provide this information. This is obviously improper, especially given PDV's and CITGO's reliance on the requested information as an affirmative defense to ComEd's claim.

PDV's and CITGO's response to this request also states that while certain documents have been provided to ComEd concerning the April 24, 1997 meeting, additional supplemental documents will also be produced. Please identify the additional documents that will be produced as part of this supplemental production. Also, please state when this supplemental production will occur.

4. Data Request 1.11

In this request, ComEd asked PDV Midwest and CITGO to explain the basis of their affirmative defense that "ComEd knew of Respondents' and Unocal's respective ownership interests in the refinery, needle coking and calciner plants" during the time periods at issue. (PDV's and CITGO's Answer at 30). With respect to this affirmative defense, ComEd requested that PDV Midwest and CITGO:

- ☐ list the facts that support this statement;
- ☐ identify the manner in which ComEd was informed of the "respective ownership interests in the refinery, needle coking and calciner plants"
- ☐ identify any individual at ComEd who was informed of the "respective ownership interests in the refinery, needle coking and calciner plants"
- ☐ identify any individual who informed ComEd of the "respective ownership interests in the refinery, needle coking and calciner plants"
- ☐ identify all persons with knowledge of the facts supporting this allegation.

(Request 1.11, sub-parts (a) – (e)).

None of this information was provided. Once again, this is an instance where PDV Midwest and CITGO have raised an issue as an affirmative defense but have refused to provide underlying information.

Thomas A. Andreoli

January 3, 2003

Page 6

5. Data Request 1.12

This request also involved PDV's and CITGO's contention that they had "allocated" the costs of electricity to Needle Coker and Chicago Carbon. ComEd asked PDV and CITGO in this request to "describe the terms or methodology" that they employed to perform this allocation. Obviously, the terms and methodology concerning these purported allocations is an important issue in this case. Documents PC 03752 and PC 03757 indicate that documents were presented to the Needle Coker Executive Committee defining the procedure used for electricity "allocation." ComEd presumes that this is the same allocation PDV and CITGO reference in their Answer. Nonetheless, this information was not provided.

6. Data Request 1.13

This request asked PDV and CITGO to identify the corporate structure of PDV, Needle Coker and Chicago Carbon. This issue is relevant for a number of reasons, including PDV's affirmative defense that representatives of ComEd were provided with an accurate description of the stated ownership interests for the entities operating at the Facility. Nevertheless, PDV and CITGO objected to this request as "overly broad and unduly burdensome."

7. Data Requests 1.01 and 1.02

These data requests seek, respectively, documents that discuss or refer to ComEd's Rate CS Contract at issue (Request 1.01) and to the electric service provided to the Facility (Request 1.02). PDV and CITGO have objected to these requests as "overly broad" and "unduly burdensome." While PDV Midwest and CITGO purportedly produced some documents subject to these objections, they did not identify the types of documents that had been withheld from production based on their objections.

This is to request that PDV and CITGO identify the types of documents that are responsive to these requests that have been withheld from production based on the objections referred to above. Unless these documents are identified, ComEd cannot determine whether responsive documents have been withheld.

FOLEY LARDNER

Thomas A. Andreoli
January 3, 2003
Page 7

8. The Timeframe of PDV's and CITGO's Production


In the cover letter that accompanied PDV's and CITGO's responses to ComEd's data requests, you stated that certain responsive documents were enclosed, but that the production of documents was limited to those documents dated January 1, 1997 and thereafter. Earlier documents were apparently withheld from production unless, as stated in the letter, specifically indicated in the accompanying responses.

PDV Midwest's and CITGO's unilateral decision to withhold responsive documents that are dated prior to January 1, 1997, is improper. Documents dated prior to that date are not, as a general matter, irrelevant to this case. These documents should be produced, if they are responsive to ComEd's requests.

Conclusion

Your prompt attention to these matters is appreciated. Please call me after you have reviewed this letter. Hopefully, the issues discussed herein can be resolved through compliance with ComEd's requests. If not, ComEd will have no choice but to raise these issues in an appropriate motion filed with the Commission.

Very truly yours,

A handwritten signature in black ink that reads "Robert Feldmeier" followed by a stylized flourish or initials.

Robert C. Feldmeier

cc: William J. McKenna
Walter C. Hazlitt